

A Ming Holdings (M) Sdn Bhd v Yusof Latif Holdings (M) Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02-334 OF 2001
GOPAL SRI RAM, MOHD GHAZALI YUSOFF AND ZULKEFLI JJCA
28 MARCH 2006

C *Civil Procedure — Appeal — Decision of trial judge — Whether trial judge contradicted himself on critical issues in his judgment*

D One Dato Mohd Yusof was a director of the plaintiff. At the request of Dato Yusof, the defendant repaid a loan facilities obtained by Dato Yusof from Credit Leasing and in consideration whereof, Dato Yusof agreed with the shareholders of the defendants that the plaintiff's shares in two share certificates be held by the defendants as beneficial owners until such time. The plaintiff claimed it was the owner of the two share certificates and therefore entitled therefore to have its property back. The defendant submitted however that it was entitled to a lien over the two share certificates. The High Court granted judgment for the plaintiff and the defendant appealed. In arguing this appeal, learned counsel for the defendant submitted that the learned judge's decision could not stand because his first judgment dated 30 May 2001 contained passages upon the critical issues which were contradicted by passages in his later judgment.

E **F** **Held**, dismissing the appeal:
There was no contradiction at all in the judgment of the High Court when read in the context of the whole case (see para 8). In the face of the plea taken by the defendant, the learned judge's approach was beyond criticism. At the end of the day when the dust of the argument that had clouded this case settled only one real issue emerged — ie, was the judge entitled to accept the evidence of the plaintiff in preference to that of the defendant? This court was of the opinion that he was (see para 10).

H [Bahasa Malaysia summary]

I Seorang bernama Dato Mohd Yusof merupakan pengarah plaintiff. Atas permintaan Dato Yusof, defendan telah membayar balik satu kemudahan kewangan yang diperoleh daripada Dato Yusof daripada Credit Leasing dan sebagai balasan, Dato Yusof bersetuju dengan pemegang-pemegang saham defendan-defendan agar saham-saham plaintiff dalam dua sijil saham dipegang oleh defendan-defendan sebagai pemilik benefisiari sehingga suatu waktu. Plaintiff mendakwa ia adalah pemilik dua sijil saham tersebut dan oleh itu berhak mendapat balik harta tanah tersebut. Defendan berhujah bahawa ia berhak terhadap suatu lien ke atas kedua-dua sijil saham tersebut. Mahkamah Tinggi memberikan penghakiman menyebelahi

plaintif dan defendan telah merayu. Dalam menghujahkan rayuan ini, peguam bijaksana bagi pihak defendan berhujah bahawa keputusan hakim yang bijaksana tidak boleh kekal kerana penghakiman pertamanya bertarikh 30 Mei 2001 mengandungi petikan-petikan di mana persoalan-persoalan kritikal yang bercanggah dengan petikan-petikan dalam penghakiman beliau yang kemudiannya.

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Diputuskan, menolak rayuan tersebut:

Tiada percanggahan langsung dalam penghakiman Mahkamah Tinggi apabila dibaca dalam konteks keseluruhan kes (lihat perenggan 8). Berdasarkan rayuan yang dibuat oleh defendan, pendekatan hakim yang bijaksana tidak boleh dikritik. Pada akhirnya hanya wujud satu persoalan — iaitu, adakah hakim tersebut berhak menerima keterangan plaintif daripada keterangan defendan? Mahkamah ini berpendapat bahawa beliau berhak (lihat perenggan 10).]

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Notes

For cases on decision of trial judge, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 771–773.

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Cases referred to

Clarke v Edinburgh & District Tramways Co (1919) SC 35 (refd)

Haji Mohamed Dom v Sakiman [1956] MLJ 45 (refd)

Law Kam Loy & Anor v Boltex Sdn Bhd & Ors [2005] 3 CLJ 355 (refd)

Salomon v Salomon & Co [1897] AC 22 (refd)

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Tan Swee Cheng (Cheong Wai Meng & Van Buerle) for the appellant.

RJ Manecksha (Ong & Manecksha) for the respondent.

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Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

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[2] This is an appeal by the defendant in the court below against the judgment entered against it for the return of two share certificates in a company known as Global Harvest Sdn Bhd. The plaintiff's case is simple enough. It says it is the owner of the two share certificates in question. It is prima facie entitled therefore to have its property back. The defendant's answer is a little complex. It says it is entitled to a lien over the two share certificates by reason of an antecedent transaction which, according to the defendant's own story, is in the following terms.

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[3] One Dato Mohd Yusoff bin Abdul Latiff is a director of the plaintiff. He used the name of his secretary, Nancy Ng, to obtain certain loans from a company called Credit Leasing Corporation (M) Sdn Bhd or CLC for short. The defendant says that it settled the CLC loans or, what at the trial was referred to as the 'Nancy loans'. The thrust of the defendant's case is to be found in paragraph 4(1)(d) of its amended statement of defence and counterclaim. This is how the paragraph reads:

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- A** at the request of Datuk Yusof, the defendant through its shareholders paid to Credit Leasing a total sum of RM470,955.46 (inclusive of interests) in full and final settlement of the loan facilities obtained by Datuk Yusof from Credit Leasing using his secretary's name and in consideration whereof, Datuk Yusof agreed with the shareholders of the defendants that the plaintiff's said shares shall be held by the Defendants as beneficial owners until such time that Datuk Yusof or the plaintiffs repay the said sum of RM470,955.46 together with interest at the rate of 15% per annum or at the rate charged by Thai Military Bank, Bangkok, to the defendants.
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[4] The learned judge, after a trial at which *viva voce* evidence was led made the following finding:

- C** Taking their evidence together, I have no hesitation in making a finding, on the balance of probabilities, that it was the Defendant who paid DW2's loan to CLC.

For completeness we must mention that DW2 was Ms Nancy Ng in whose name the CLC loans were taken.

- D** [5] The learned trial judge came to the conclusion, after a careful analysis of the evidence, that the plaintiff was entitled to have its shares. An appeal was brought to this court against that finding and after hearing arguments a differently constituted Bench of this court on 5 March 2002, remitted the case to the learned judge to obtain his views on the following issues:
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- 1) Whether the defendant made the payment of the loan to Credit Leasing Corporation Sdn Bhd.;
- 2) Whether the defendant had a lien over the shares No 027 and 051 of Global Harvest Sdn Bhd.;
- F** 3) If the defendant had a lien was it legal or equitable lien;
- 4) Whether such a lien is barred by either limitation or laches;
- 5) Whether there was any unjust enrichment;
- G** 6) If so, was it barred by either limitation or laches.

[6] The learned judge in his judgment dated 7 January 2003, answered the issues as follows: the first issue in the affirmative; all the other issues in the negative. The judge's initial decision was not altered by his reconsideration of the issues remitted to him by this court. In other words, the plaintiff still succeeded.

- H** [7] In arguing this appeal, learned counsel for the defendant has submitted that the learned judge's decision cannot stand for two reasons. First, because his first judgment dated 30 May 2001, contains passages upon the critical issues which are contradicted by passages in his later judgment. The relevant passages relied upon by the defendant are as follows:
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- (i) It is further noted that, upon payment of the loans to CLC, all the Global Harvest shares including the shares belonging to the plaintiff, returned by CLC were used as collateral for the various loans taken by the defendant. Thus the evidence of DW1 that the defendant was to keep the said two share certificates, until PW1 settle the loan

cannot be true. The defendant did not in fact keep the share certificates, instead used the share certificates as collateral to obtain loans, and the loans taken were not for the benefit of the plaintiff but for the defendant's self interest.

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- (ii) Taking the evidence of PW1 and DW2 as a whole, there is no doubt that the two share certificates of Global Harvest belonging to the plaintiff as well as other Global Harvest shares belonging to the defendant as well as other company shares involving the Chan family, PW1 and Syed Azahari were pledged to the various financial institution inside and outside Malaysia for the purpose of borrowing. Though I am unable to accept PW1's evidence that the purpose of the borrowing was to pay the fine of Singapore \$2 million, there is ample evidence that the two Global Harvest share belonging to the Plaintiff were pledged to the various financial institution for the business of the companies run by the Chan family together with PW1 and one Syed Azahari. Thus what is left to be decided by this Court is whether the defendant had a lien over the said two share certificates preventing it being returned to the plaintiff until and unless the sum of RM470,955.46 together with interest is paid by the plaintiff to the defendant.

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[8] With respect, we are unable to agree with the arguments of learned counsel. In our judgment when the above passages are read in the context of the whole case, there is no contradiction between them at all. To paraphrase the learned judge, this is what he was saying. That the CLC shares were secured by the two share certificates. That the loans were taken by PW1, ie Dato Yussof Latiff and the latter loans were obtained by pledging the same two share certificates with various other financial institutions and the monies obtained thereby were used by the Chan family, Dato Yussof and one Syed Azahari. It was for the defendant of course to establish that there was an agreement between itself and the plaintiff in order to maintain its claim of a lien over the shares in question. Needless to say, the defendant did not come up to proof. That is hardly surprising because nowhere in its pleaded case is there mention of an agreement between itself and the plaintiff in respect of the shares. As may be seen from its amended case already referred to earlier, its dealings were with Dato Yussof. It is apparent to us that there is a confusion in the appellant's mind about the dealings that form the factual matrix of its defence.

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[9] It is trite that a company is a separate individual from its shareholders and directors. The property of the company belong to the company, not to the share-holders or directors. These elementary principles were established in the seminal case of *Salomon v Salomon & Co* [1897] AC 22 at p 30. Recently, this court had the occasion to reemphasis this point in *Law Kam Loy & Anor v Boltex Sdn Bhd & Ors* [2005] 3 CLJ 355 (CA)

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[10] In the face of the plea taken by the defendant, the learned judge's approach is beyond criticism. At the end of the day when the dust of the argument that had clouded this case settles only one real issue emerges. It is this. Was the judge entitled to accept the evidence of the plaintiff in preference to that of the defendant? We think he was. As was pointed out in the course of the arguments by our learned brother Mohd Ghazali JCA, there was not a scrap of evidence either by way of correspondence or a board resolution evidencing the agreement asserted by the defendant. In these circumstances how are we, as a Court of Appeal to approach the findings made by the learned judge? We think that the answer has been provided to

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A us by the speech of Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co* (1919) SC 35 (HL), at p 36 where his Lordship says:

B When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

E [11] Applying the approach set out in the above quoted passage, it is our duty to defer to the learned judge's finding of fact that there was no agreement between the defendant and the plaintiff. At the risk of repetition, that was not the defendant's pleaded case. The duty of the trial judge was to decide the issues raised by the parties, see *Haji Mohamed Dom v Sakiman* [1956] MLJ 45 (CA). The learned judge, it is quite clear, adhered to this rule.

F [12] For the reasons already given this appeal is without merit. It is dismissed. The defendant must pay to the plaintiff the costs of this appeal. The deposit will be paid out to the plaintiff to account of its taxed costs. All orders of the High Court are affirmed.

G *Appeal dismissed.*

Reported by Loo Lai Mee

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